85-1232

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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IN THE SUPREME COURT
OF THE UNITED STATES
OCTOBER TERM, 1985

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NO. _____

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CHRIS STAMOS, Individually and as Next Friend of Nicky Stamos, a Minor, et al.,

Appellants,

V.

SPRING BRANCH INDEP. SCHOOL DIST., et al.,

Appellees.

* * * * * * * * * * *

ON APPEAL FROM THE SUPREME COURT OF TEXAS

* * * * * * * * * * *

MOTION OF APPELLEE UNIVERSITY INTERSCHOLASTIC LEAGUE TO DISMISS OR AFFIRM

* * * * * * * * * * *

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MOTION OF APPELLEE UNIVERSITY INTERSCHOLASTIC LEAGUE TO DISMISS OR AFFIRM

* * * * * * * * * * *

Appellee the University Interscholastic League moves the Court

to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of Texas on the grounds that the appeal is not within the Court's jurisdiction, and it is manifest that the questions on which decision of the cause depends are so unsubstantial as not to need further argument.

I.

STATE STATUTE INVOLVED AND NATURE OF THE CASE

A. Statute

This appeal questions the validity of Section 21.920 of the Texas Education Code, more commonly known as the "no-pass, no-play" rule. That rule provides that no student within the Texas public school system who receives a grade lower than 70 on a scale of 100

in any academic class for a given grade reporting period is eligible to participate in extracurricular activities during the following grade reporting period. TEX. EDUC. CODE ANN. §21.920(b) (Vernon Supp. 1985). Consistent with this statute, the University Interscholastic League, a voluntary non-profit association of Texas public schools that establishes rules and procedures for conducting the majority of interscholastic competitions among Texas junior and senior high schools, amended Section 400 of its Constitution and Contest Rules to provide as follows:

> [A]n individual is eligible to participate in a League varsity contest as a representative of a participant school if he:

* * *

> (g) has been in attendance and has passed the number of courses required by state law and by rules of the State Board of Education,
>
> (h) is passing the number of courses required by state law and by rules of the State Board of Education . . . .

B. Proceedings Below

On the basis of the statute and Section 400 of Appellee's Constitution and Contest Rules, Appellants were deemed ineligible for extracurricular activities in the spring of 1985, during the six-week grading period following the six-week grading period in which each received a grade lower than 70 in an academic class. For the most part, Appellants were disqualified from participating in extracurricular athletic activities, such as track and

spring football and basketball. One Appellant was disqualified from participation is his school's symphonic band, and one Appellant was disqualified from participation in his school's orchestral band. See Appendix, Temporary Injunction of the 334th District Court of Houston, Harris County, Texas, pp. 2-3.

Contending that such disqualification deprived them of freedom of association with their peers, personal and family privacy, and the right of private family discipline, and impinged upon their "protected rights," Appellants sought and obtained a temporary restraining order and a temporary injunction. The trial court concluded that the statute was

unconstitutional because it deprived Appellants of fundamental rights in accordance with their allegations and because it was "not rationally related to the State's professed purpose in promulgating [the statute], to provide a negative or positive incentive to improve the students' education." On direct appeal, the Texas Supreme Court reversed the trial court, ruling that the statute violated neither the equal protection nor due process guarantees of the state or federal constitution.

II.

ARGUMENT

A. The Appeal Is Not Within the Court's Jurisdiction

This appeal is brought pursuant to 28 U.S.C. §1257(2)(1966), which provides for direct appeals to this

Court of "[f]inal judgments or decrees" rendered by the highest state court in which a decision can be had. While this appeal calls into question the constitutional validity of Texas' so-called "no-pass, no-play" rule under the United States Constitution as required by §1257(2), the judgment is not final as required by that provision. The judgment sought to be appealed was rendered by the Texas Supreme Court in ruling upon the propriety of the trial court's grant of a temporary injunction; Appellants' request for a permanent injunction, as well as numerous issues not disposed of by the Supreme Court's ruling, remain for disposition in the trial court. A state court's ruling on an order

granting or denying a temporary injunction is not final when the entire case is not thereby concluded. Musser v. Sheppard, 299 U.S. 512 (1936). In Collins v. Miller, 252 U.S. 364 (1920), the Court wrote:

> A case may not be brought here by appeal . . . in fragments. To be appealable the judgment must be not only final, but complete . . . And the rule requires that the judgment to be appealed should be final not only as to all the parties, but as to the whole subject matter and as to all the causes of action involved.

Id. at 370 (citations omitted).

This appeal is not within the Court's jurisdiction for the further reason that Appellants lack standing to raise the majority of the issues presented. While Appellants contend that this is a class action suit, such

was not the case at the time of the trial's court temporary injunction order nor at the time of the Supreme Court's decision on that order. The Texas Supreme Court noted specifically that there were no parties before it either with learning disabilities or who had failed an honors or advanced course. Spring Branch Indep. School Dist. v. Stamos, 695 S.W. 2d 556, 559, 560 (1985). Nor were there any parties before it who were barred from those extracurricular activities that Appellants contend "entail the exercise of First Amendment Rights, i.e. student government, the school newspaper, the debate squad, etc." Enforcement of the challenged judgment must deprive a party, not another, of a constitutional

right properly asserted below. Liberty Warehouse Co. v. Burley Tobacco Growers' Coop. Marketing Assoc., 276 U.S. 71, 88 (1928). Such party must have a personal stake in the outcome of the litigation "to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." Baker v. Carr, 369 U.S. 186, 204 (1962). Appellants' lack of standing is further evidence that the challenged judgment is not ripe for review by this Court.

B. The Case Presents No Substantial Question Needing Further Argument

The substance of Appellants' appeal challenges the "no-pass, no-play" rule

on the basis that it denies Appellants both equal protection and due process of law. These challenges have long been settled, however, in Appellee's favor, so much so that the Fifth Circuit Court of Appeals wrote recently:

> We repeat: we are not super referees over high school athletic programs. Questions about eligibility for competition may loom large in the eyes of youths, and even their parents. We do not disparage their interest in concluding, as here, that these issues are not of constitutional magnitude. Behind this observation rest important values of federalism and the reality that the mighty force of the constitutional commands ought not to be so trivialized. We pause to say this, not to succumb to rhetorical flourish but to remind.

Hardy v. Univ. Interscholastic League, 759 F.2d 1233, 1235 (5th Cir. 1985).

The privilege of participation in extracurricular activities generally is no different than the privilege of participation in extracurricular athletics specifically, and the courts have held again and again that such participation does not amount to a constitutionally protected claim of entitlement. See, e.g., Niles v. Univ. Interscholastic League, 715 F. 2d 1027, 1031 (5th Cir. 1983), and Walsh v. Louisiana High School Athletic Assoc., 616 F. 2d 152, 159 (5th Cir. 1980), cert. denied, 449 U.S. 1124 (1981).

Nor does ineligibility for participation in extracurricular activities on the basis of the Texas statute violate traditional notions of equal protection. Because the statute

neither infringes upon a fundamental right nor creates an inherently suspect classification, equal protection analysis requires only that the classification in question be rationally related to a legitimate state interest. See Harris v. McRae, 448 U.S. 297, 324, reh. denied, 448 U.S. 917 (1980), and Denis J. O'Connell High School v. Virginia High School League, 581 F. 2d 81, 84 (4th Cir. 1978), cert. denied, 440 U.S. 936 (1979). The task of the court is not to determine if the rule is the best way, or even a good way, of accomplishing a legitimate state objective. It is only to determine whether "any state of facts reasonably may be conceived to justify it"; beyond

that, the wisdom of the state must be allowed to prevail. McGowan v. Maryland, 366 U.S. 420, 426 (1961). In this regard, the Texas Supreme Court's analysis is beyond attack:

> The no-pass, no-play rule distinguishes students based upon whether they maintain a satisfactory minimum level of performance in each of their classes. Students who fail to maintain a minimum proficiency in all of their classes are ineligible for participation in school-sponsored extracurricular activities for the following six-week period, with no carry over from one school year to the next. The rule provides a strong incentive for students wishing to participate in extracurricular activities to maintain minimum levels of performance in all of their classes. In view of the rule's objective to promote improved classroom performance by students, we find the rule rationally related to the legitimate state interests in providing a quality education to Texas' public school students.

Spring Branch Indep. School Dist. v. Stamos, supra at 560.

III.

CONCLUSION

Wherefore, Appellee respectfully submits that the appeal is not within the Court's jurisdiction and that the questions on which decision of this cause depends are so unsubstantial as not to need further argument, and Appellee respectfully moves the Court to dismiss this appeal, or, in the alternative, to affirm the judgment entered herein by the Supreme Court of Texas.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On this _____ day of _____, 198_____, a true copy of the foregoing pleading was mailed, with first-class postage prepaid, to:

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_____
Lucius Desha Bunton, Jr.

STATEMENT OF MAILING

On this day appeared before me, the undersigned Notary Public, Lucius Desha Bunton, Jr., who, being by me first duly sworn, stated as follows:

"My name is Lucius Desha Bunton, Jr. and I am a member of the Bar of the Supreme Court of the United States.

"Pursuant to Rule 28.2 of such Court, the foregoing Motion of Appellee University Interscholastic League to Dismiss or Affirm is being deposited in a United States post office or mailbox, with first-class postage prepaid, and properly addressed to the Clerk of this Court, within 30 days of Appellee's receipt of Appellant's Jurisdictional Statement, on this ____ day of January, 1986."

_____
LUCIUS DESHA BUNTON, JR.

SWORN TO AND SUBSCRIBED before me on this _____ day of _____, 1986, to certify which witness my hand and seal of office.

_____
Notary Public in and for
the State of Texas

_____
Printed Name

My commission expires:

_____